Supreme Court, U. S.
FILED
OCT 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-632

HAROLD J. SMITH, Superintendent, Attica Correctional Facility,

Petitioner,

v.

BURTON C. GRAHAM,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

D. BRUCE CREW, III
Chemung County District Attorney
226 Lake Street
P. O. Box 588
Elmira, N. Y. 14902
(607) 737-2944

JAMES L. KENNEDY
Assistant Attorney General
65 Court Street
Buffalo, N. Y. 14202
Counsel for Petitioner

Table of Contents.

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Reasons for Granting the Writ	5
1. The case at bar presents a significant double jeopardy question which specifically was left unanswered last year by footnote 9 of *Greene v. Massey*, 437 U. S. 19, 26, 98 S. Ct. 2151, 57 L. Ed. 2d 15 (1978)	5
Conclusion	12
Opinion of United States Court of Appeals	13
Judgment of United States Court of Appeals	23
Decision and Order of the United States District Court for the Western District of New York	25

CITATIONS.

CASES:

	Page
Burks v. United States, 437 U. S. 1	6, 7, 8, 9
Christ v. Bretz, 437 U. S. 28, 32 n. 6	6
Green v. United States, 355 U. S. 184, 187-188	9
Greene v. Massey, 437 U. S. 19, 26	6, 9
People v. Graham, 20 A. D. 2d 949 (3rd Dept. 1964)	3
People v. Graham, 43 A. D. 2d 182 (3rd Dept. 1973)	4
People v. Meyer, 11 N. Y. 2d 162	3
United States v. Ball, 163 U. S. 662	6
United States v. Scott, 437 U. S. 82	6
United States v. Tateo, 377 U. S. 436, 466	7
United States ex rel. Graham v. Mancusi, 457 F. 2d 463 (2nd Cir. 1972)	4

IN THE

Supreme Court of the United States

October Term, 1979.

No. .

HAROLD J. SMITH, Superintendent, Attica Correctional Facility,

Petitioner,

v.

BURTON C. GRAHAM,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The petitioner, Harold J. Smith, on behalf of the People of the State of New York, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 18, 1979.

Opinion Below.

The opinion of the Court of Appeals and the opinion of the District Court are not yet reported. So, each are included in petitioner's appendix.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on July 18, 1979. That judgment affirmed a decision of the United States District Court for the Western District of New York which granted the respondent's request for a Writ of Habeas Corpus. This petition for certiorari was filed within ninety (90) days after entry of the Second Circuit's judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

Question Presented.

1. Does the Double Jeopardy Clause of the Federal Constitution prohibit a state from retrying a defendant on a charge for which he was tried and convicted, if, upon appeal, an appellate court discounts certain evidence which was used and admissible at the time of trial—but subsequently held inadmissible—and then holds based on the remaining legally competent evidence that the trial record established the defendant's guilt of only a lesser offense.

Statement of the Case.

On August 26, 1961, Lucille Graham, the estranged wife of the respondent, was found floating face down in the bathtub of her home. The police questioned the respondent that day and he admitted that he had fought with his wife, that he had cut off her breathing to protect himself and that he had placed her in the bathtub. Burton Graham denied, however, that he knew his wife was dead when he put her in the tub or, if alive, that she would drown. Respondent was arrested and arraigned that night on a charge of Murder in the Second Degree.

On September 1, 1961, the police questioned the respondent a second time because they had discovered "suicide notes" at the victim's home. The respondent did not yet have an attorney. During the course of this second interview, he admitted fabricating the notes and leaving them at the scene. He also acknowledged that he knew Lucille would drown when he left her in the tub.

On September 6, 1961, Burton Graham was indicted for Murder in the First Degree, a capital offense. He was tried in January and February of 1962 and convicted by a jury of Murder in the Second Degree. At trial, the respondent's statement of August 26 and his post-arraignment statement of September 1 together with the suicide notes were admitted in evidence against him.

On Appeal, the respondent successfully argued that his post-arraignment statement should not have been used against him. *People v. Graham,* 20 AD 2d 949, 294 N.Y.S. 2d 97 (3rd Dept. 1964). The Appellate Division held that it was bound by the *Meyer* decision of the New York Court of Appeals, which was handed down two months after respondent's conviction, but which nonetheless required retroactive exclusion of all post-arraignment statements. See, *People v. Meyer,* 11 N.Y.2d 162, 227 N.Y.S. 2d 427, 182 NE 2d 103 (1962). Excluding the post-arraignment statement of September 1 and the fabricated suicide notes, the Appellate Division concluded that the trial evidence was insufficient to sustain a conviction of murder, but because the remaining evidence was sufficient to convict of Manslaughter in the First Degree, it modified respondent's conviction to that lesser charge.

Following a series of unrelated state hearings and appeals which are not pertinent here, the respondent pursued a petition for a federal writ of habeas corpus. His

application was denied in the District Court, but, on appeal, the Court of Appeals for the Second Circuit ruled in respondent's favor and ordered issuance of the writ unless respondent was retried within sixty (60) days. *United States ex rel. Graham v. Mancusi,* 457 F.2d 463 (2nd Cir. 1972). The Second Circuit held that the State Appellate Division had improperly denied the petitioner his right to a jury trial, when it modified his murder conviction to Manslaughter in the First Degree. The Second Circuit reasoned that once the Appellate Division found that the post-arraignment statement and suicide notes were inadmissible and prejudicial it was constrained to reverse the conviction and remand the case for retrial.

The People then moved the case for retrial on the charge of Murder in the Second Degree. In April of 1972, within the sixty (60) day period fixed by the Second Circuit, respondent was retried and again convicted by a trial jury on the charge of Murder in the Second Degree. He was sentenced to a term of imprisonment of twenty (20) years to life.

On appeal to the State Appellate Division, the respondent again obtained a modification of a murder conviction down to Manslaughter in the First Degree. *People v. Graham,* 43 AD 2d 182, 350 N.Y.S.2d 458 (3rd Dept. 1973). The decision of the Appellate Division accepted respondent's claim that retrial on the murder charge placed an unconscionable premium on his right to appeal directly in state courts and collaterally in the federal courts. 43 AD 2d at p. 188. Because the court found that the evidence at respondent's second trial amply supported his conviction, it held that a downward modification would remedy the claimed defect. As a result, respondent was remanded to the trial court for resentencing and received a sentence of six (6) to twelve (12) years.

The 1973 decision of the Appellate Division was appealed by both parties to the Court of Appeals. While affirming the result, New York's highest court held that respondent should not have been retried on Murder in the Second Degree because under state statutory law that charge had effectively been dismissed by the original downward modification of the Appellate Division in 1964. 36 N.Y.2d 633, 638-639, 370 N.Y.S.2d 888, 331 NE 2d 673 (1975).

Thereafter, respondent again commenced a federal habeas corpus proceeding, seeking to vacate his conviction and either be retried on the charge of Manslaughter in the First Degree or have all charges dismissed. One year before the habeas corpus proceeding was decided, the respondent's full sentence expired. Nevertheless, on January 12, 1979, the Honorable John T. Curtin ruled that the retrial of respondent on the charge of Murder in the Second Degree had placed him twice in jeopardy for the same offense. Therefore, Judge Curtin granted respondent's request for the writ of habeas corpus (App. 25-33). That decision was appealed by the People of the State of New York, but it was affirmed by the United States Court of Appeals for the Second Circuit on July 18, 1979 (App. 13-22).

Reasons for Granting the Writ.

1. The case at bar presents a significant double jeopardy question which specifically was left unanswered last year by footnote 9 of *Greene v. Massey*, 437 U. S. 19, 26, 98 S. Ct. 2151, 57 L. Ed. 2d 15 (1978).

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." Although this language appears deceptively clear, its com-

plexities and subtleties have given rise to much recent litigation. See citations in *Christ v. Bretz,* 437 U.S. 28, 32 n. 6, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978). That litigation is very important because it clarifies constitutional principles which had become confused and it rejects holdings that were inconsistent with the purpose of the double jeopardy guarantee. *See, e.g. Burks v. United States,* 437 U.S. 1, 98 S. Ct. 2148, 57 L. Ed. 2d 1 (1978); *United States v. Scott,* 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978). The Court's work, however, is not yet complete. The case at bar contains a factual setting which squarely presents the significant question which the Court did not need to decide in its recent decision of *Greene v. Massey.* See, 437 U.S. at p. 26 n. 9. The issue is whether the Double Jeopardy Clause forbids the retrial of a defendant on a charge for which he has been convicted if upon appeal an appellate court holds that certain evidence was not properly admitted against the defendant at his trial and, then discounting that evidence, the remaining "legally competent" evidence was insufficient to establish the defendant's guilt. Petitioner respectfully submits that, while *Burks v. United States, supra,* and *Greene v. Massey, supra,* do not expressly decide this issue, those decisions suggest that the Double Jeopardy Clause does not bar such a retrial. Indeed, to hold otherwise, as the federal courts below have done, jeopardizes the Court's recent efforts to clarify the double jeopardy ramifications of appellate decisions.

In *United States v. Ball,* 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896), the first significant case to consider the double jeopardy implications of an appellate reversal, the Supreme Court established two principles which still lie at the foundation of double jeopardy analysis. The Court held: first, that the Double Jeopardy Clause bars the retrial of a person on an offense for which he was

acquitted; and, second, the Clause permits the retrial of a defendant who was tried and convicted but subsequently on appeal succeeded in having his conviction overturned due to a prejudicial defect which occurred in the original proceedings. See, *Burks v. United States, supra.*

In the *Burks* decision, Chief Justice Burger noted that several theories have been advanced to allow retrial following an appellate reversal which seeks to rectify errors that occurred at the original trial. 437 U.S. at p. 15 n. 9, 98 S. Ct. at p. 2149, 57 L. Ed. 2d at p. 12. The rationale now accepted, however, is that advanced in *United States v. Tateo,* 377 U.S. 436, 466, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964):

> "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in proceedings leading to conviction." See, *Burks v. United States, supra,* 437 U.S. at p. 15.

In effect, when a conviction is set aside because some prejudicial error occurred at trial, the Constitution permits retrial because, on the other hand, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error and, on the other, society maintains a valid concern for insuring that the guilty are punished. *Burks vs. United States, supra.*

In the case at bar, the federal courts in the habeas corpus proceeding below have failed to recognize society's interest in punishing a man who has twice been convicted of murder by trial juries. They have treated the decision of the Appellate Division, Third Department in 1964 as a reversal which effectively acquitted the respondent of the charge of Murder in the Second Degree. That

decision, however, unequivocally holds that the respondent's first trial was defective because a prejudicial post-arraignment confession and two suicide notes, which were linked to the respondent by that confession, were introduced on the prosecution's direct case against the respondent.[1] It was only after the Appellate Division excluded this evidence, which it conceded established the element of premeditation, that it concluded that the remaining evidence was insufficient to sustain a murder conviction and therefore modified respondent's conviction to Manslaughter in the First Degree.

Petitioner respectfully submits that the federal courts below have erred when they held that the Double Jeopardy Clause barred respondent's retrial on the charge of Murder in the Second Degree. Their decisions fail to recognize the significant difference between an appellate order of dismissal based upon insufficient proof at trial and a dismissal based upon insufficient proof after evidence admitted at trial in good faith, which established the defendant's guilt, is discounted from the record by an appellate court. The Double Jeopardy Clause clearly bars the retrial of a case which falls within the former category, but it does not bar retrial in those embraced by the latter category. *Burks v. United States, supra; cf. Greene v. Massey, supra.* Manifestly, the case at bar falls in the latter category.

It should be emphasized that the decisions below are not consistent with the fundamental purpose of the double

[1]It should be emphasized that the introduction of this evidence was not in bad faith because at the time the respondent was originally tried, a post-arraignment statement was admissible.

jeopardy guarantee. If a man is acquitted because of insufficient proof, the underlying rationale is that:

> "The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States,* 355 U.S. 184, 187-188, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).

Stated more concisely, when a prosecutor fails to introduce sufficient evidence to establish a person's guilt beyond a reasonable doubt, the Clause precludes him from taking a second opportunity to supply evidence which he failed to muster in the first proceeding. *Burks v. United States, supra.* 437 U.S. at p. 11.

Different considerations control, however, when a prosecutor presents sufficient evidence to establish each element of the crime beyond a reasonable doubt. In that situation, an appellate reversal affords the convicted defendant an opportunity to fairly readjudicate the question of his guilt. At the same time, the prosecution may do its utmost to convict that defendant a second time. In short, a defendant who successfully overturns his original conviction, because some prejudicial evidence was improperly received has no right or indeed expectation, to be free from further prosecution on the same level as the original conviction. That is the controlling constitutional rationale which permitted the State of New York to reprosecute the respondent on the charge of Murder in the Second Degree. *Burks v. United States, supra;* see, *Greene v. Massey, supra.*

In addition, contrary to the assertions of the federal decisions below, the New York Court of Appeals in 1975 did not hold that the respondent's second trial placed him twice in jeopardy. What the Court did hold was that the state Criminal Procedure Law precluded retrial on charges deemed "dismissed upon appeal". *People v. Graham, supra,* 36 N.Y.2d at pp. 638-639. The Court specifically quoted and emphasized the following language of section 470.55 of the Criminal Procedure Law:

> "Upon a new trial of an accusatory instrument resulting from an appellate court order reversing a judgment and ordering such new trial, such accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except (a) those upon or of which the defendant was acquitted or deemed to have been acquitted, and (b) *those dismissed upon appeal* or upon some other post-judgment order." (Emphasis added in the original.) 36 N.Y. 2d at pp. 638-639.

The Court, thereafter, discussed clause (b) and concluded that the original modification by the Appellate Division necessarily dismissed the charge of Murder in the Second Degree, citing section 470.20, subdivision 3 of the Criminal Procedure Law.[2] 36 N.Y.2d at p. 639. This language is important because the federal courts below purport to agree with New York Court of Appeals when they conclude that respondent's second murder trial placed him

[2]Subdivision 3 of Section 470.20 provides in pertinent part:

> "Upon a modification of a judgment after trial for legal insufficiency of trial evidence with respect to one or more but not all of the offenses of which the defendant was convicted, the court shall dismiss the count or counts of the accusatory instrument determined to be legally unsupportable and must otherwise affirm the judgment."

twice in jeopardy according to federal double jeopardy standards. To the contrary, the New York Court did not find a double jeopardy violation. It held that state statutory law compelled it to reduce respondent's second murder conviction to Manslaughter in the First Degree, a conviction which now has been erased by the decisions of the federal courts below.

Ultimately, the review of the Supreme Court is necessary: first, to resolve the double jeopardy implications of an appellate dismissal based upon insufficiency of proof after evidence introduced and admitted at trial in good faith is discounted from the record, and, second, if petitioner is correct, to reinstate respondent's Manslaughter conviction thereby upholding society's interest in punishing the guilty.[3]

[3]The Supreme Court acknowledged in *Carafas v. LaVallee,* 391 U.S. 234, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968) that the punishment associated with a criminal conviction does not completely end when a man is released from incarceration. There are "collateral consequences" which applied then and still apply today in New York. Petitioner respectfully submits that, just as this case was not moot for the respondent below, it is not moot now for the People of the State of New York. Petitioner should not, therefore, be denied review to this Court of a decision which wrongly relieves the respondent of his felony record, and the adverse consequences associated with it, merely because he is no longer incarcerated.

Conclusion.

The writ of certiorari should issue to review the judgment and conviction of the Second Circuit.

Respectfully submitted,

D. BRUCE CREW III,
Chemung County District Attorney,
226 Lake Street,
P. O. Box 588,
Elmira, N. Y. 14902
(607) 737-2944.

JAMES L. KENNEDY,
Assistant Attorney General,
65 Court Street,
Buffalo, N. Y. 14202

Counsel for Petitioner.

Opinion of United States Court of Appeals.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 1108—August Term, 1978.

(Argued May 30, 1979 Decided July 18, 1979.)

Docket No. 79-2022

BURTON C. GRAHAM,

Petitioner-Appellee,

v.

HAROLD J. SMITH, Superintendent Attica Correctional Facility,

Respondent-Appellant.

Before:

Moore, Friendly and Feinberg, Circuit Judges.

Appeal from an order of the District Court for the Western District of New York, John T. Curtin, Chief Judge, granting a writ of *habeas corpus* to a state prisoner.

Affirmed.

Philip Halpern, Esq., Buffalo, N. Y. (State University of New York Faculty of Law and Jurisprudence, Buffalo, N. Y., Rolf Nils Olsen, Jr., Esq., of Counsel), for Petitioner-Appellee.

D. Bruce Crew, III, Esq., Elmira, N. Y. (Chemung County District Attorney, Elmira, N. Y., James L. Kennedy, Esq., Assistant Attorney General, of Counsel), for Respondent-Appellant.

FRIENDLY, Circuit Judge:

This case, arising from the death of Lucille Graham in Elmira, N. Y. on August 26, 1961, has had a long history. This is recorded in many opinions of the New York courts[1] and in one of our own, *U.S. ex rel. Graham v. Mancusi,* 457 F.2d 463 (2 Cir. 1972), familiarity with which is assumed.

Burton Graham was indicted in 1961 for first degree murder of his wife Lucille and was convicted of second degree murder. Important evidence against him was a highly inculpatory post-arraignment statement taken on September 1, 1961, which was immensely more damaging than a statement made shortly after discovery of the homicide. The September 1 statement revealed that he had typed out two notes in his wife's name in which she admitted sexual misconduct, child abuse and an intention to go away, and that he had left them where they would be found by the police. See 457 F.2d at 465-66. The Appellate Division for the Third Department, *People v. Graham,* 20 A.D.2d 949, 249 N.Y.S.2d 97 (1964), ruled that under *People v. Meyer,* 11 N.Y.2d 162, 227 N.Y.S.2d 427 (1962), this statement was improperly received because taken from Graham after arraignment without the presence of an attorney, and that the two notes were also improperly received because their identification and reception in evidence had been based solely on the illegally obtained statement. The Appellate Division held that admission of this evidence had given rise to substantial prejudice, and that in the absence of the erroneously admitted material the evidence was insufficient to warrant conviction of second degree murder, to wit, the killing of a human being "when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation," former N.Y. Penal Law, §1046, current version at N.Y. Penal Law, §125.25. However, the court concluded that the properly admitted evidence sufficed to support a conviction of first degree manslaughter, a killing "[i]n the heat of passion, but in a cruel and unusual manner", former N.Y. Penal Law, §1050, current version at N.Y. Penal Law, §125.20. Availing itself of the power confided to it by §543 of the former N.Y. Code of Criminal Procedure, the court modified the portion of the judgment convicting Graham of second degree murder so as to convict him of first degree manslaughter, and sentenced him to a term of not less than 10 nor more than 20 years, the maximum permitted by law. Graham's motion for leave to appeal to the New York Court of Appeals was denied.

[1] *People v. Graham,* 20 A.D.2d 949, 249 N.Y.S.2d 97 (1964); *People v. Graham,* 27 A.D.2d 203, 277 N.Y.S.2d 943 (1967), aff'd mem. 27 N.Y.2d 616, 313 N.Y.S.2d 753 (1970); *People v. Graham* 69 Misc.2d 670, 330 N.Y.S.2d 711 (Sup. Ct. 1972), modified, 43 A.D.2d 182, 350 N.Y.S.2d 458 (1973), aff'd 36 N.Y.2d 633, 370 N.Y.S.2d 888 (1975).

After various state proceedings unnecessary to detail, see 457 F.2d at 467, Graham sought federal habeas corpus in the District Court for the Western District of New York. Reversing a denial of his petition by that court, we held that the Appellate Division had deprived Graham of due process since he was entitled to have any claim of first degree manslaughter presented to a trier of the facts which would not have been exposed to tainted evidence.[2] We directed issuance of the writ, 457 F.2d at 471:

[2] We said, 457 F.2d at 468-69:

> We think the Appellate Division, by what doubtless was inadvertent error, wrongly assimilated a case where evidence supporting a conviction of a more serious offense had been unlawfully received to one where the evidence was merely insufficient for that purpose. In the latter event, the trier of the facts has already found every element of a lesser included offense on evidence which was properly before it. In such a case there is no unfairness in the appellate court's modifying the judgment to apply only to the lesser offense, of which the jury could properly have convicted and surely would have, although it may well be that, even in such a case, the defendant is constitutionally entitled to a new sentencing on the lesser crime at which he will have the assistance of counsel. See *Mempa v. Rhay,* 389 U.S. 128, 88

(footnote continued)

S.Ct. 254, 19 L.Ed.2d 336 (1967), held fully retroactive in *McConnell v. Rhay,* 393 U.S. 2, 89 S.Ct. 32, 21 L.Ed.2d 2 (1968). In contrast, here it is sheer speculation what the jury would have done if the September 1 confession and the admittedly fabricated notes had not been before it. To be sure, the August 26 statement and the medical and other evidence would have been sufficient to sustain a conviction for first degree manslaughter, or even perhaps for second degree murder as the judge dissenting in the Appellate Division thought, whether or not Graham had taken the stand. But without the material held to have been erroneously received, there would have been a sharp issue of credibility whether Graham had merely done what he deemed necessary to quiet Lucille and had left believing that she was alive and the cold water would shortly revive her, or whether he had caused her death "in the heat of passion, but in a cruel and unusual manner." Former N.Y. Penal Law §1050(2), McKinney's Consol.Laws c. 40. It is not a sufficient answer that the justices of the Appellate Division may well have been justified in thinking that the latter conclusion would have been the more reasonable or even that the former would have been unreasonable. A jury hearing solely the evidence held to have been legally admissible might well have found Graham guilty of only second degree manslaughter, former New York Penal Law §1052, if indeed it did not exercise its "power to bring in a verdict [of acquittal] in the teeth of both law and facts." See *Horning v. District of Columbia,* 254 U.S. 135, 138, 41 S.Ct. 53, 54, 65 L.Ed. 185 (1920). The trial judge surely would not and, of course, could not have directed a verdict of guilty of first degree manslaughter or of any other crime. See, *e.g., People v. Walker,* 198 N.Y. 329, 334, 91 N.E. 806 (1910); *People v. Upton,* 38 Hun. 107 (1885). Yet what the Appellate Division did here is the equivalent in practical effect—indeed worse from the defendant's standpoint in several ways. The judges had not heard or seen the witnesses; they had read the inadmissible material; and Graham was afforded no opportunity to be heard, with the assistance of counsel, on the sentence for the crime of which he was convicted. (Footnotes omitted).

> unless Graham is retried within sixty days from the issuance of our mandate or such further reasonable time as the district court, for good cause shown, may allow.

While our opinion did not specify for what crime Graham was to be retried, an issue not discussed in the briefs, we[3] scarcely supposed that, quite apart from considerations of double jeopardy, the county prosecutor would seek to retry Graham on a charge for which the Appellate Division had held there was no adequate admissible evidence—unless, as was not suggested to us, new evidence had been developed, as was then permited by New York law.[4] However, the prosecutor elected to do just that, and the local judge sustained this course of action, *People v. Graham,* 330 N.Y.S.2d 711 (Sup. Ct., Chemung Co., 1972).

Faced with the second degree murder charge, Graham testified in his own defense, again along the lines of

[3]The writer, who authored the previous opinion, and Judge Moore were on the panel.

[4]New York law then applicable permitted a new trial where a conviction at a former trial had been set aside for insufficient evidence. See, e.g., *People v. Bearden,* 290 N.Y. 478 (1973); *People v. Guardino,* 286 N.Y. 132 (1941); *People v. Romano,* 279 N.Y. 392 (1939); *People v. Lee,* 308 N.Y. 302 (1955) (dictum). Presumably this was to allow the prosecution to cure previous defects and not simply to have another chance with the same evidence. Cf. 2 Wright, Federal Practice and Procedure §470, at 270 & n. 31. This practice is no longer permitted as a matter of state law, see N.Y. Crim. Proc. Law §470.20(2) (McKinney's Consol. Laws 1971), and appellate courts must dismiss the indictment when reversing for insufficient evidence. This result is now mandated by recent Supreme Court decisions holding it a violation of the double jeopardy clause to retry a defendant who has won reversal of a previous trial on grounds of insufficient evidence as opposed to trial error. *Burks v. United States,* 437 U.S. 1 (1978); *Greene v. Massey,* 437 U.S. 19 (1978).

his August 26, 1961 statement, see 457 F.2d at 465. If the jury credited this, the evidence would not have permitted it to find that Graham had "a design to effect the death" of his wife, and perhaps it might not even have found that he intended to kill her "in a cruel and unusual manner." The prosecutor having indicated that he proposed to use the September 1 confession in cross-examination, the judge conducted a hearing under *People v. Huntley,* 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1963), on whether it was voluntary and concluded that it was and therefore was admissible for impeachment.[5] In cross-examination the prosecutor called attention to such statements in the confession as that "My troubles and worries had built up to such an extent that I decided Lucille had to die" and that she had gone limp and Graham "went out of the room knowing she was drowning or going to drown." With this testimony before it, even although only as impeachment, the jury convicted of second degree murder.

On appeal, 43 A.D.2d 182, 350 N.Y.S.2d 458 (1973), the Appellate Division rejected most of Graham's arguments. Turning to his double jeopardy contentions, the court agreed that this "provision of the Constitution was clearly violated by defendant's retrial on the charge of murder in the second degree since the earlier decision of this court (20 A.D.2d 949, 249 N.Y.S.2d 97), modifying the judgment so as to convict him of manslaughter in the first degree, and the subsequent denial of leave to appeal to the Court of Appeals, had the same finality as that of a verdict of acquittal of the greater charge." 43 A.D.2d at 188, 350

[5]The Appellate Division assumed, 43 A.D.2d at 186, 350 N.Y.S.2d at 463, that *Harris v. New York,* 401 U.S. 222 (1971), holding statements inadmissible under *Miranda* were admissible for impeachment purposes, see also *Oregon v. Hass,* 420 U.S. 714 (1975), applied to statements inadmissible under *People v. Meyer,* 11 N.Y.2d 162, 227 N.Y.S.2d 427 (1962), see also *Massiah v. United States,* 377 U.S. 201 (1964). This issue was neither addressed by Judge Curtin below nor argued before us.

N.Y.S.2d at 464-65. However, the court again exercised its power, now under New York CPL §470.15, to convict Graham of manslaughter in the first degree and remanded for resentence. Both sides having appealed, the Court of Appeals affirmed. *People v. Graham,* 36 N.Y.2d 633, 370 N.Y.S.2d 888 (1975).

Graham returned to the District Court for the Western District of New York with petition for *habeas corpus* filed on November 10, 1975, claiming that his constitutional rights had been impaired by his retrial for second degree murder, even though his conviction had been reduced to first degree manslaughter which he conceded the legally admitted evidence was sufficient to support. He was conditionally released from prison on May 4, 1976, and his full sentence expired on January 13, 1978, a year before the district court upheld his petition. However, this did not moot the case. *Carafas v. LaVallee,* 391 U.S. 234 (1968). Chief Judge Curtin, in a well-reasoned opinion, directed that the writ of *habeas corpus* be granted and that the parties should notify the court within 30 days whether any further proceedings in the state court were contemplated.

The State makes a number of attempts to show that the Appellate Division and the Court of Appeals were in error in holding that the action of the Appellate Division on the first appeal, followed by denial of leave to appeal to the Court of Appeals, operated as an acquittal of second degree murder. It claims that our judgment "wiped out" the Appellate Division's. It did nothing of the sort. What we "wiped out" was the conviction for first degree manslaughter, which was all that was before us. The State also argues that the Appellate Division's holding that its first ruling was an acquittal was based on a misperception of federal law rather than an application of state law. Even if the point were relevant, we see no basis for the State's contention; in any event the Court of Appeals has expressly ruled that the

portion of the order relating to charge of murder in the second degree "was equivalent to an acquittal." 36 N.Y.2d at 639, 370 N.Y.S.2d at 895.[6]

The interesting question is whether the prosecutor's unconstitutional action in trying Graham a second time for second degree murder, for which no valid conviction could have been obtained, also invalidates the conviction for first degree manslaughter to which the Appellate Division reduced it, with the subsequent approval of the Court of Appeals. It would seem that if the State had tried Graham before the jury for both the barred second degree murder charge and the open first degree manslaughter charge and the jury had convicted of the latter, the conviction could not stand. *U.S. ex rel. Hetenyi v. Wilkins,* 348 F.2d 844 (2 Cir. 1965) (Marshall, J.), *cert. denied,* 383 U.S. 913 (1966);[7] *Price v. Georgia,* 398 U.S. 323 (1970). It is equally plain that if after our *habeas corpus* decision, 457 F.2d 463, the State had prosecuted Graham only for first degree manslaughter and the jury had convicted, the double jeopardy clause would provide Graham no relief. The question is how the matter stands

[6]See note 4, *supra.*

[7]The rather complicated sequence of charges, convictions and appellate court actions in *Hetenyi* was as follows:

Trial	*Charge*	*Conviction*	*Appellate Action*
1	1st degree murder	2d degree murder	reversed for trial error
2	1st degree murder	1st degree murder	reversed for trial error
3	1st degree murder	2d degree murder	affirmed

The double jeopardy was held to lie in the trials for first degree murder on trials 2 and, more pertinently, 3, although the verdict in trial 1 operated as an acquittal of that charge under the principle of *Greene v. United States,* 355 U.S. 184 (1957), see 348 F.2d at 856.

when, on the basis of sufficient untainted evidence, the jury has convicted of the greater offense and a reviewing court has reduced the conviction to what would have been permissible in a prosecution solely for the lesser offense.

While there is language in *Hetenyi* and *Price* that might suggest that the State must be deprived of any conviction on a trial that had included a charge barred by double jeopardy, we do not believe the courts intended to go so far. See *Pacelli v. United States,* 588 F.2d 360, 366 (2 Cir.), *cert. denied,* 434 U.S. 1010 (1978).[8] A sufficient basis for the *Hetenyi* and *Price* decisions was that the presence of the barred more serious charge created a serious risk that the jury in *Hetenyi* might have been led to compromise on a more rather than a less serious unbarred charge, e.g. second degree murder rather than first degree manslaughter, see 348 F.2d at 865-66,[9] or in *Price,* to have convicted on a lesser included offense, voluntary manslaughter, rather than to have acquitted or hung, see 398 U.S. at 331. On that view Graham's case is distinguishable; the jury convicted on the more serious charge and there is thus no indication that the verdict was a compromise resulting from inclusion of the barred charge. Even more clearly we could not assume that, in taking the action that they did, the Appellate Division and the Court of Appeals were influenced by the presence of a charge they had held to be barred by the double jeopardy clause.

While the fear of a compromise verdict was the principal basis for *Hetenyi,* the opinion did not stop with this. It said that when a barred charge is included, "[t]he

[8]See also *United States v. Alexander,* 471 F.2d 923, 939 (D.C. Cir., as amended, 1973), *cert. denied,* 409 U.S. 1044 (1972) (opinion of Bazelon, J.); *id.* at 966 (opinion of McGowan, J.).

[9]In *Evans v. United States,* 397 F.2d 675, 677-78 (D.C. Cir. 1968), *cert. denied,* 394 U.S. 907 (1969), then Judge Burger, the later author of *Price,* interpreted *Hetenyi* as turning on this possibility.

question is not whether the accused was actually prejudiced, but whether there is *reasonable possibility* that he was prejudiced," 348 F.2d at 864 (emphasis in original). It further indicated than an exceedingly small showing on this score would suffice. *Id.*

On that basis we think Graham meets the test, although barely so. The claim is that but for the inclusion of the second degree murder charge he might have chosen not to testify, thereby avoiding introduction of the extremely damaging admissions in his September 1 statement. The difficulty lies in accepting the premise. The August 26 statement and other evidence would have been ample to convict Graham of first degree manslaughter. Still it is not completely fanciful to suppose that, apart from the threat of a longer sentence for second degree murder when he may well have been approaching the end of his imprisonment for manslaughter, and the greater stigma of a murder conviction, see *Price v. Georgia, supra,* 398 U.S. at 331 n. 10, Graham might have chosen to take the chance that, if he had stood silent, the jury might have found him guilty only of assault or even have decided that, whatever the law, ten years' imprisonment for this homicide were enough. See *Horning v. District of Columbia,* 254 U.S. 135, 138 (1920). On the particular facts of this case we think this was a sufficient showing of prejudice to satisfy the rather low requirement of *Hetenyi* and then to invalidate the manslaughter conviction.

The order of the district court is therefore affirmed.

Judgment of United States Court of Appeals.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of July one thousand nine hundred and seventy-nine.

Present:

Hon. Leonard P. Moore,
Hon. Henry J. Friendly,
Hon. Wilfred Feinberg,
Circuit Judges.

BURTON C. GRAHAM,

Petitioner-Appellee,

v.

HAROLD J. SMITH, Superintendent Attica Correctional Facility,

Respondent-Appellant.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk
By: Sara Piovia
Deputy Clerk

Decision and Order of the United States District Court for the Western District of New York.

UNITED STATES DISTRICT COURT,

Western District of New York.

Burton C. Graham,

Petitioner,

vs.

Harold J. Smith, Superintendent Attica Correctional Facility,

Respondent.

Appearances:

Legal Assistance Program, State University of New York at Buffalo School of Law, R. Nils Olsen, Esq. & Michael Davidson, Esq. (Brenda Desmond & Robert Adelman, Student Attorneys, of Counsel), for the Petitioner.

Louis J. Lefkowitz, Esq., Attorney General of the State of New York (James L. Kennedy, Esq., of Counsel), Buffalo, New York, for the Respondent.

The determinative issue in this application for writ of habeas corpus is whether or not the petitioner's rights under the double jeopardy clause of the fifth amendment have been violated.

Petitioner was originally tried and convicted on the charge of second degree murder in Supreme Court, Chemung County in 1962. The charge had been brought against petitioner after his wife had been found dead in her home in Elmira, New York, on August 26, 1961.

The Appellate Division ruled that a post-arraignment statement made on September 1, 1961, and certain

alleged suicide notes, which contained the victim's purported signature but which had allegedly been prepared by petitioner, were inadmissible. That court concluded that the evidence, exclusive of the post-arraignment statement and the suicide notes, was not sufficient to sustain a conviction of murder and modified the judgment under §543 of the then-applicable Code of Criminal Procedure so as to convict petitioner of manslaughter in the first degree. *People v. Graham,* 20 A.D.2d 949, 249 N.Y.S. 2d 97 (3d Dept. 1964). The New York State Court of Appeals denied leave to appeal on July 22, 1964.

In 1965, petitioner began a *coram nobis* proceeding in Supreme Court, Chemung County, and, after a Huntley hearing, the court suppressed a written statement of petitioner that had been admitted into evidence at the first trial and ordered a new trial. As a result of this proceeding, petitioner was released on bail. In 1967, the Appellate Division reversed and dismissed the *coram nobis* application. *People v. Graham,* 27 A.D.2d 203, 277 N.Y.S.2d 943 (3d Dept. 1967). The New York Court of Appeals then affirmed the Appellate Division without opinion [*People v. Graham,* 27 N.Y.2d 616, 313 N.Y.S.2d 753 (1970)] and petitioner was remanded to prison.

Petitioner then filed with this court a petition for writ of habeas corpus which was denied by the Honorable Harold P. Burke in 1971.

The United States Court of Appeals for the Second Circuit held that petitioner's due process rights had been violated and directed that the writ should issue if petitioner were not retried within sixty days. The court held that "once the Appellate Division determined that the jury should not have been exposed to the September 1 statement and the notes, due process required a new trial." *United States ex rel. Graham v. Mancusi,* 457 F.2d 463, 470 (2d Cir. 1972). The court offered the following rationale for its decision:

> We think the Appellate Division, by what doubtless was inadvertent error, wrongly assimilated a case where evidence supporting a conviction of a more serious offense had been unlawfully received to one where the evidence was merely insufficient for that purpose.

Id. at 468. The Second Circuit concluded that the Appellate Division's action would have been proper had there merely been a finding that the evidence was insufficient to support a conviction for second degree murder. The Appellate Division's action was equivalent to the trial judge directing a verdict of guilty of first degree manslaughter. A new trial was ordered because "it is sheer speculation what the jury would have done if the September 1 confession and the admittedly fabricated notes had not been before it." *Id.* at 468.

Petitioner was retried and convicted of second degree murder in 1972 despite petitioner's claim, raised before trial, that he was being denied his fifth amendment right not to be placed twice in jeopardy for the same crime. *People v. Graham,* 330 N.Y.S.2d 711 (Sup.Ct. Chemung Co. 1972).

On appeal, the Appellate Division accepted petitioner's claims that he had been subjected to double jeopardy:

> It is now well settled that the Double Jeopardy Clause of the Fifth Amendment applies to state criminal proceedings (*Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707; *United States ex rel. Hetenyi v. Wilkins,* 348 F.2d 844 [2d Cir., 1965], cert. den. 383 U.S. 913, 86 S.Ct. 896, 15 L.Ed. 2d 677 [1966]; *People v. Ressler,* 17 N.Y.2d 174, 269 N.Y.S.2d 414, 216 N.E.2d 582). In the instant case, that provision of the constitution was clearly violated by defendant's retrial on the charge of murder in the second degree since the earlier de-

cision of this court (20 A.D.2d 949, 249 N.Y.S.2d 97) modifying the judgment so as to convict him of manslaughter in the first degree, and the subsequent denial of leave to appeal to the Court of Appeals, had the same finality as that of a verdict of acquittal of the greater charge (*compare Forman v. United States,* 361 U.S. 416, 426, 430, 80 S.Ct. 481, 4 L.Ed.2d 412; *Bryan v. United States,* 338 U.S. 552, 560, 70 S.Ct. 317, 94 L.Ed. 335; *People v. Nappi,* 18 N.Y.2d 136, 140, 272 N.Y.S.2d 347, 350, 219 N.E.2d 176, 178; *People v. Klose,* 18 N.Y.2d 141, 144, 272 N.Y.S.2d 352, 353, 219 N.E.2d 180, 181). We emphatically reject the notion that since our prior action was declared void by the Second Circuit Court of Appeals (*United States ex rel. Graham v. Mancusi, supra*) defendant was never placed in jeopardy thereby. As the United States Supreme Court noted in a related context, this argument "sounds a bit strange" since defendant could quietly have served out his sentence under this void judgment—as he partially did in this case—had he not challenged it (*Benton v. Maryland, supra,* 395 U.S. at 796, 89 S.Ct. 2056). Furthermore, to permit a retrial on a charge of murder in the sceond degree would, in effect, be to place an unconscionable and unconstitutional premium upon the exercise of defendant's legal right to challenge state criminal proceedings via Federal habeas corpus (*United States ex rel. Hetenyi v. Wilkins, supra,* 348 F.2d at 859; *People v. Jackson,* 20 N.Y.2d 440, 452, 285 N.Y.S.2d 8, 19, 231 N.E.2d 722, 730).

People v. Graham, 43 A.D.2d 182, 350 N.Y.S.2d 458 (3d Dept. 1973). However, rather than order a new trial, the court found that, since the evidence amply supported the conviction, it was proper for the court to modify the judgment pursuant to Criminal Procedure Law §470.15, subds. (2) and (3), to convict petitioner of manslaughter in the first degree and remand the proceeding for resentencing.

In affirming the Appellate Division's decision, the New York State Court of Appeals interpreted §470.55, subd. 1,[1] to bar petitioner's reprosecution on the charge of second degree murder.

> Clause (b) [of C.P.L. §470.55, subd. 1] makes it quite clear that an order granting a new trial has no effect on a charge which was dismissed after judgment had been entered. The implications are equally clear. Unless the dismissal is expressly reversed and the count restored for retrial at the final appellate level, the courts of this State lack the power to retry the defendant on such a charge. The mere granting of a new trial on another count, without more, will not restore a charge which has been dismissed "upon appeal or upon some other post-judgment order." Thus when the defendant was retried in 1972, that portion of the order of the Appellate Division setting aside the conviction for murder in the second degree—which then necessarily carried with it a dismissal of the charge (CPL 470.20, subd. 3; *People v. Crimmins,* 36 N.Y.2d 230, 367 N.Y.S.2d 213, 326 N.E. 2d 787)—was still in effect since it had never been expressly nullified. Upon the second trial then, the court lacked the power to try the defendant for murder in the second degree and the Appellate Division properly set the conviction aside.

---

[1]Criminal Procedure Law §470.55, subd. 1, reads as follows:

Upon a new trial of an accusatory instrument resulting from an appellate court order reversing a judgment and ordering such new trial, such accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the court of such trial, except (a) those upon or of which the defendant was acquitted or deemed to have been acquitted, and (b) those dismissed upon appeal or upon some other post-judgment order.

People v. Graham, 36 N.Y.2d 633, 639, 370 N.Y.S.2d 888 (1975). That court concluded that, since the tainted evidence had not been introduced at the second trial, it was proper for the Appellate Division to modify the conviction rather than to order a new trial on the charge of first degree manslaughter.

Having exhausted his state court remedies as required by 28 U.S.C. §2254(b), petitioner filed a *pro se* application for writ of habeas corpus with this court, on November 10, 1975. On February 11, 1976, Michael Davidson, Esq. was appointed to represent petitioner. On March 24, 1976, counsel filed with the court an amended petition seeking to have the judgment of conviction vacated and either a retrial on the charge of first degree manslaughter or dismissal of all charges as the only effective ways to secure petitioner's rights under the double jeopardy clause. Subsequently, briefs were filed with the court and oral argument was heard on September 29, 1976.

Thereafter, a stipulation and order were filed on June 9, 1977, amending the amended petition by deleting the claim in ¶6 that petitioner's rights were violated when his attorney was allegedly denied access to petitioner's son during his 1972 trial.

The most current information available to the court indicates that petitioner was conditionally released from prison on May 4, 1976 and that his full sentence expired on January 13, 1978. Although he is no longer in the custody of state officials, the matter is not moot since the "in-custody" jurisdictional requirement is determined as of the date the petition was filed in this district court. *Carafas v. LaVallee,* 391 U.S. 234, 237-240 (1968); *United States ex rel. Wojtycha v. Hopkins,* 517 F.2d 420 (3d Cir. 1975).

In his claim that he has been subjected to double jeopardy, petitioner urges that the constitutional wrong lay in his being re-tried for second degree murder and that

his exposure to double jeopardy cannot be remedied merely by modification of the conviction to a lesser included offense.

I am persuaded by the logic of the New York State appellate courts, referred to above, that it was improper to reprosecute petitioner for the crime of second degree murder. However, I do not believe that the remedy approved by the New York Court of Appeals, modification of the judgment to convict petitioner of first degree manslaughter [*see also People v. Gunner,* 27 N.Y.2d 678, 314 N.Y.S.2d 3 (1970)] was adequate.

Had the Appellate Division in 1964 merely found trial error in admitting the statement of September 1, 1961 and the alleged suicide notes and had it then directed a new trial, there could be no valid claim that petitioner was subjected to double jeopardy. *United States v. Tateo,* 377 U.S. 463, 465 (1964). *See also United States v. Wilson,* 420 U.S. 332, 341 n.9 (1975). In choosing, instead, to modify the judgment to convict petitioner of first degree manslaughter, the Appellate Division also decided as a matter of law that the jury could not properly have returned a verdict of guilty to the charge of second degree murder with the inadmissible evidence excluded. If the trial court, after trial, had dismissed the murder conviction upon a motion for judgment of acquittal, there would be no question that the petitioner could not again be tried for that offense even if the trial court were in error in setting aside the conviction. The Appellate Division's modification of judgment, coupled with the denial of leave to appeal by the New York Court of Appels, had the same effect under New York law as such action by a trial judge described above. The New York statutory provision that divests courts of the power to retry a defendant on the same charges in such circumstances (C.P.L. §470.55, subd. 1) merely reiterates the constitutionally recognized ban against double jeopardy.

The scope of New York's modification of judgment statute, §470.15 of the Criminal Procedure Law, is very broad:

> [A]n intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant.

Whether or not it is still appropriate for an appellate court to modify a judgment of conviction once it has found the evidence legally insufficient to support such judgment [*compare Burks v. United States,* 46 U.S.L.W. 4632, 4636 (June 14, 1978), *with United States ex rel. Graham v. Mancusi, supra,* at 468], it is not appropriate for an appellate court to take such action once it has determined that the constitutional ban against double jeopardy has been violated.

As the United States Supreme Court has recognized, the underlying premise of the double jeopardy ban is that a defendant should not be twice tried or punished for the same offense. *United States v. Wilson, supra,* at 339; *Benton v. Maryland,* 395 U.S. 784 (1969). If a defendant has been acquitted, either expressly or implicitly (*i.e.,* conviction of lesser included offense implies acquittal of greater offense) on any charge, he cannot be retried on that charge. *Price v. Georgia,* 398 U.S. 323 (1970); *Green v. United States,* 355 U.S. 184 (1957).

Since the action taken by the Appellate Division in 1964 was the equivalent of an acquittal on the charge of second degree murder, the double jeopardy clause bars a second trial on that charge in the circumstances presented in this case. See *Robinson v. Neil,* 409 U.S. 505 (1972).

Additional support for this conclusion is found in one of a number of recent Supreme Court decisions which discuss the double jeopardy ban:

> Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Burks v. United States, 46 U.S.L.W. 4632, 4636 (June 14, 1978).

The issue is not whether there was sufficient evidence to convict petitioner of first degree manslaughter. Rather, the issue is one of constitutional proportions because petitioner was subjected to double jeopardy by having to face trial a second time on the charge of second degree murder. I must, therefore, reject any argument that, since petitioner stood convicted of the same crime at both his first and second prosecutions, following the modifications of judgment by the Appellate Division, the second jeopardy was harmless error under the authority of *Chapman v. California,* 396 U.S. 18 (1967), and *Harrington v. California,* 395 U.S. 250 (1969). To paraphrase the Supreme Court, the double jeopardy clause is written in terms of the potential risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. *Price v. Georgia, supra,* at 331.

The writ of habeas corpus is granted. The parties are directed to notify the court within thirty (30) days whether or not any further proceedings in the state court are contemplated.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: January 12, 1979